

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

APRIL TERM, 1910.

No. 2154.

732

No. 18, SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA ON THE RELATION
OF CHARLES EARLY, APPELLANT,

vs.

WILLIAM P. RICHARDS, ASSESSOR OF THE DISTRICT
OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 19, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2154.

THE U. S. ex Rel. CHARLES EARLY, Appellant,
vs.
WILLIAM P. RICHARDS, Assessor of the District of Columbia.

a Supreme Court of the District of Columbia.

At Law. No. 52287.

THE UNITED STATES OF AMERICA on the Relation of CHARLES
EARLY, Relator,

vs.

WILLIAM P. RICHARDS, Assessor of the District of Columbia,
Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition.*

Filed January 14, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52287. Docket No. —.

THE UNITED STATES OF AMERICA on the Relation of CHARLES
EARLY, Relator,

vs.

WILLIAM P. RICHARDS, Assessor of the District of Columbia,
Respondent.

The Petition of Charles Early, a citizen of the United States and a resident of the District of Columbia, respectfully shows the court as follows:

(1) That the respondent, William P. Richards, is and was at the times and dates hereinafter mentioned, the assessor of the District of Columbia, and is charged by law with the duty of granting licenses for the establishment of places where automobiles of any pattern, description, or motor power whatsoever are kept for hire or are kept or stored for others for profit.

Paragraph 1 of Section 7 of Chapter 1352 of an Act of Congress approved July 1st, 1902, reads as follows:

"That no person shall engage in or carry on any business, trade, profession, or calling in the District of Columbia for which a license tax is imposed by the terms of this section without having first obtained a license so to do. Applications for licenses shall be made to the assessor of the District of Columbia, and no license shall be granted until payment for the same shall have been made. Every license shall specify by name the person, firm, or corporation to which it shall be issued, the business, trade, profession, or calling for which it is granted, and the location at which such business, trade, profession, or calling is to be carried on. Licenses granted under the terms of this section may be assigned or transferred on application upon the conditions applicable to granting the original license, and the assessor shall issue a certificate of such assignment or transfer upon the payment to the District of Columbia of a fee of Fifty cents therefor. All licenses and transfers issued or granted shall be signed by the assessor of the District of Columbia and impressed with the seal of his office."

Paragraph 13 of Section 7 of said act reads as follows:

"That the proprietors or owners of establishments where automobiles of any pattern, description, or motor power whatsoever are kept for hire or are kept or stored for others, for profit or gain, shall pay a license tax of Twenty-five Dollars per annum for ten vehicles or less and Two Dollars additional for each vehicle in addition to ten; Provided, That nothing in this paragraph shall be so construed as to exempt the owner of any vehicle using the public stands from paying the additional license tax provided in paragraph Eleven of this Section."

(2) That your petitioner is the owner of the following described real estate situate in the District of Columbia, to wit: lot numbered forty-three (43) in Commissioners' sub-division of square numbered 2558, said lot having its only frontage on a public alley 15 feet wide and known as Champlain Alley, laid out in said square as will more fully appear on reference to a plat of said square which is hereto attached marked Exhibit "A" and prayed to be read as a part of this petition, said premises being now known and described as number 2117 Champlain Alley, Northwest. That on the 17th day of Dec., 1908, your petitioner received from the Inspector of Buildings of the District of Columbia, a permit to build on said lot a garage, and your petitioner did erect on said lot a building in accordance with the terms of said permit.

(3) That your petitioner, in pursuance of his intention to establish a garage on said premises, did, on the 16th day of March, 1909, make application and received a permit from the Fire Marshal of

the District of Columbia, authorizing your petitioner to install in said garage a 110 gallon tank, said tank being for the purpose of storing gasoline, and your petitioner did receive from the Assessor of the District of Columbia a license to store gasoline in the said tank on the said premises as aforesaid.

4 (4) That your petitioner, together with one John McGuigan, did, on the 22nd day of April, 1909, enter into an agreement with the International Automobile League of America, whereby the said premises were to be and did become the official garage of the said League and said garage has from the said 22nd day of April been operated for the exclusive use of the members of said League.

(5) That on or about the 5th day of June, 1909, petitioner was informed by the Corporation Counsel of the District of Columbia, that he, the petitioner, was maintaining and operating a public garage without a license, in violation of paragraph 13 of section 7 of an Act of Congress approved July 1, 1902, said paragraph of said Act being fully set forth in paragraph 1 of this petition. On the 10th day of June, 1909, a warrant for the arrest of petitioner was issued out of the Police Court of the District of Columbia, and served on your petitioner charging him with operating a public garage on aforesaid premises, in violation of the said Act of Congress as aforesaid, and your petitioner appeared in said Police Court and was then and there informed by the said Police Court that petitioner would be compelled to obtain said license or close said garage under the penalty of a fine.

5 (6) That on the 22nd day of December, 1909, petitioner, in pursuance of his determination to establish a public garage on the premises aforesaid, did make application to William P. Richards, the respondent herein, the Assessor of the District of Columbia, for a license to operate said building as a public garage for the storing and keeping of Automobiles for others for profit or gain, and petitioner did tender to the said Assessor the requisite fee for the said license, which fee was accepted by the said Assessor and said fee did remain in the possession of the said Assessor until the 8th day of January, 1910, when said fee was returned to petitioner by the said Assessor who refused to issue said license to petitioner.

(7) That said premises as shown by said plot herewith filed is 23 feet wide by 82 feet deep and has no other frontage except upon the aforesaid alley, and is unsuitable for any other purpose except as an automobile garage, and that by reason of the refusal of respondent to issue said license your petitioner is practically deprived of the use and benefit of his said building erected originally for, and planned and equipped as, a garage.

(8) Your petitioner is advised that by reason of said paragraph 1 of Section 7 of Chapter 1352 of the Act of Congress approved July 1, 1902, it is the duty of the respondent to issue to petitioner, the license applied for by petitioner for the establishment of the said public garage on the aforesaid premises, and that this court has the

power to direct the respondent to issue the said license to petitioner.

Wherefore your petitioner prays:

(1) That the writ of Mandamus issue to the respondent, William P. Richards, commanding him to issue the license herein referred to.

(2) That a rule may be issued and served upon the respondent requiring him to appear and show cause why the prayers of this petition be not granted.

6 (3) And for such other and further relief as the nature of the case may require and to the court seem meet and just in the premises.

CHARLES EARLY.

DISTRICT OF COLUMBIA, ss:

Charles Early being first duly sworn on oath deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the matters and things therein stated of his own knowledge are true, and those stated on information and belief he believes to be true.

Subscribed and sworn to before me this 12th day of January, 1910.

[SEAL.]

HARRY D. GORDON,
Notary Public, D. C.

JAMES B. FLYNN,
C. ALBERT WHITE,
Attorneys for Petitioner.

(Here follows diagram marked page 7.)

8

Rule to Show Cause.

Filed January 17, 1910.

* * * * *

Upon consideration of the petition of Charles Early, the relator herein, it is this 17th day of January, 1910, ordered that William P. Richards, the respondent herein, show cause on the 21st day of Jan'y, 1910, why a writ of mandamus as prayed for in said petition should not be issued against the said respondent: Provided a copy of this rule be served on the said respondent, William P. Richards, on or before the 18th day of January, 1910.

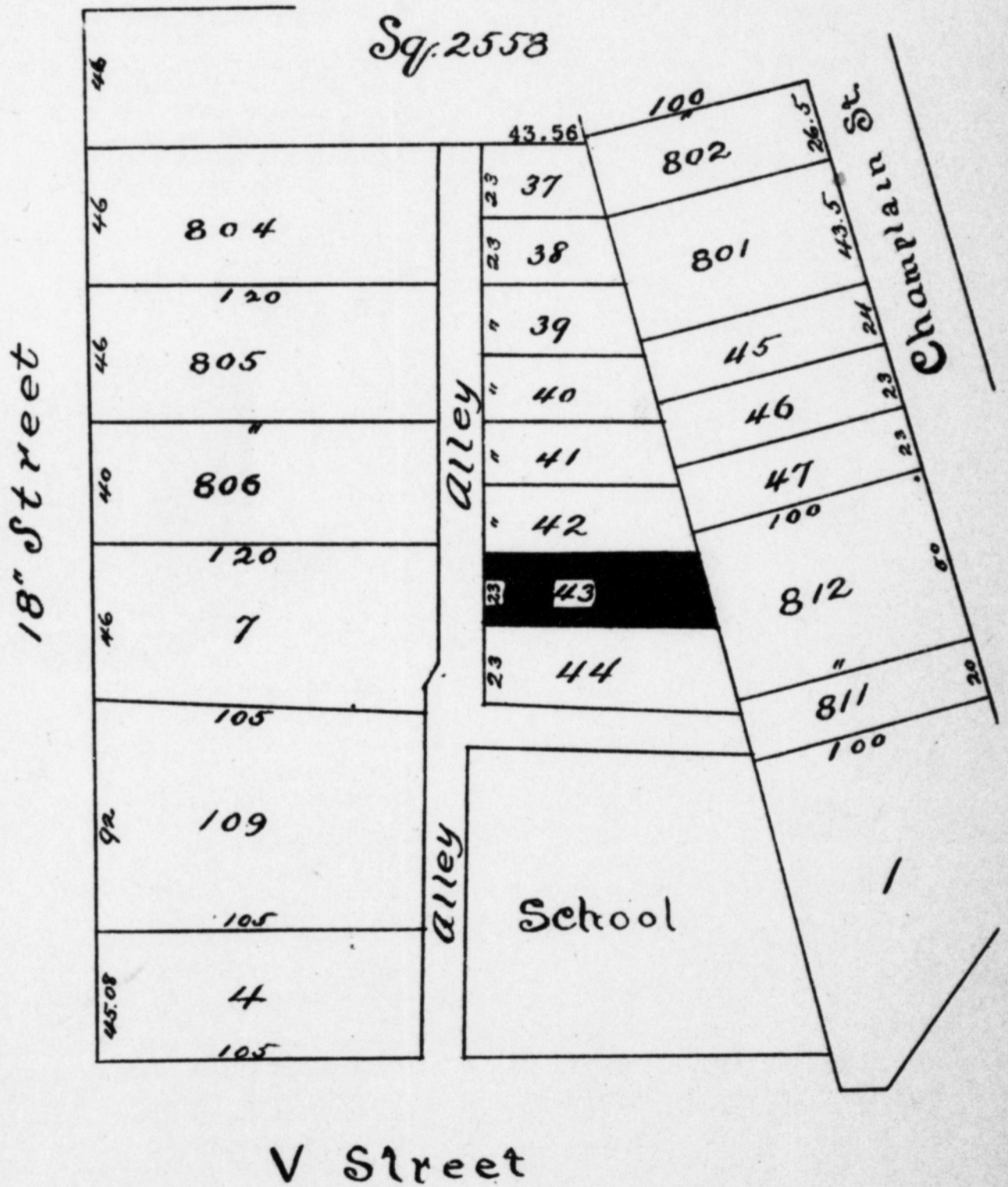
WRIGHT, *Justice.*

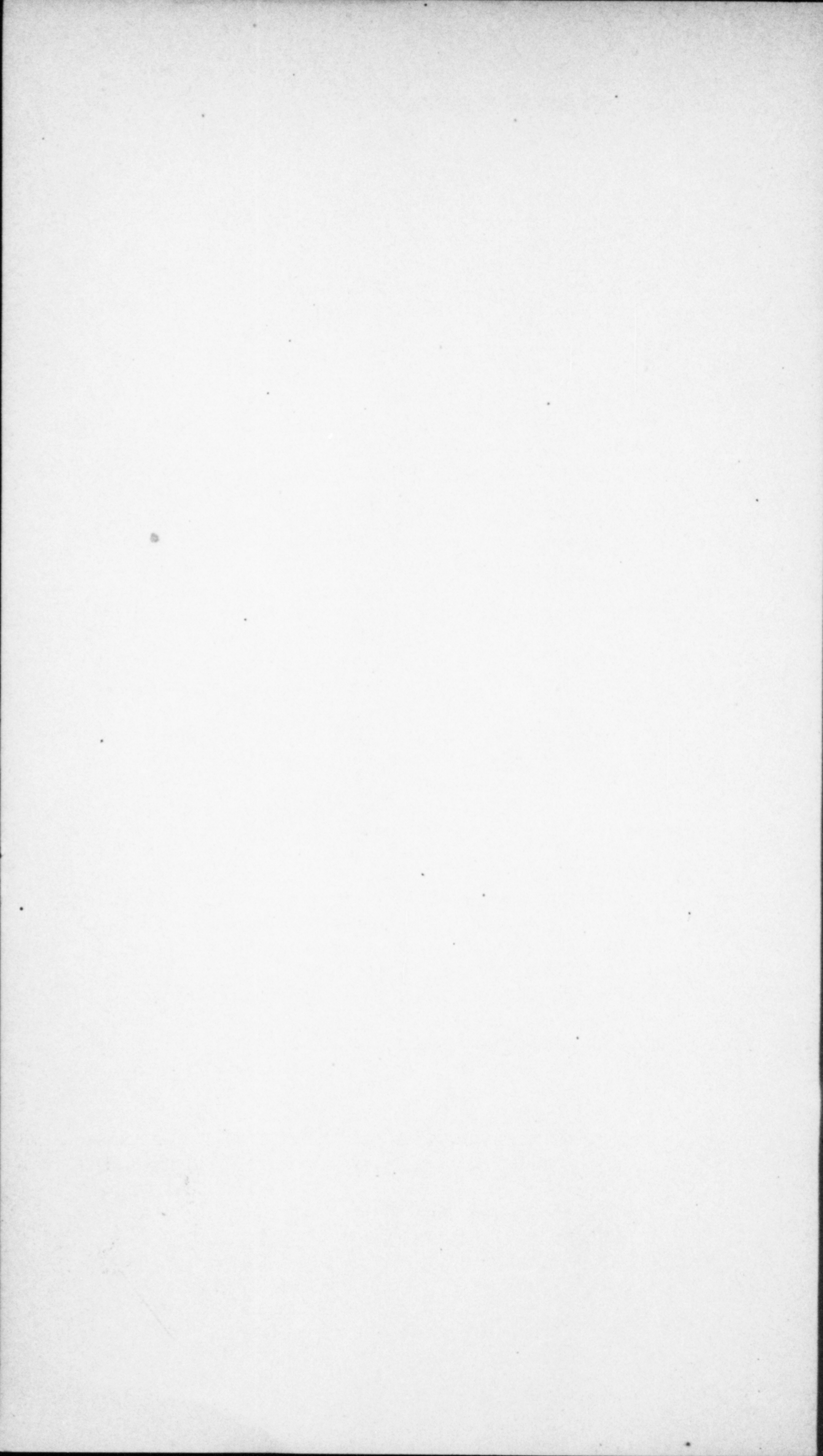
Marshal's Return.

Served copy of within rule to show cause, together with copy of petition in this cause, on William P. Richards personally.
Jan. 17, 1910.

AULICK PALMER, *Marshal,*
S.

Exhibit A





9

Answer.

Filed February 9, 1910.

* * * * *

The answer of the respondent, William P. Richards to the petition for mandamus filed herein by Charles Early, and the rule to show cause issued thereon, respectfully shows to the Court as follows:

1. Respondent admits that he is and was at the times and dates mentioned in the petition the Assessor of the District of Columbia, and says that his duties as such Assessor are fixed by law and the police and building regulations in force in the District of Columbia, hereinafter more particularly referred to.

2. This respondent has no reason to doubt that the relator is the owner of the property mentioned in paragraph two of said petition. Further answering said paragraph two, respondent says that the official records of the office of the Building Inspector of the District of Columbia disclose that on December 14, 1908, the relator applied to the Inspector of Buildings for permit to build a private garage (not a public garage) on said lot 43, which said lot is described as in the rear of premises No. 2118 Eighteenth Street, Northwest, in the City of Washington, District of Columbia. Said lot is an interior lot fronting on a public alley fifteen feet wide, and is not connected

10 with said premises on Eighteenth Street. Respondent further says that on December 17, 1908, the then Inspector of Buildings granted relator permission to erect thereon a one-story brick private garage (not a public garage); that on May 19, 1909, the said private garage building was completed and said deposit was released to relator on May 27, 1909. This respondent further answering says that he did not and has not, nor did nor has any other official of the District of Columbia interfere or interfered, or object or objected to the erection of the said private garage nor to the use of said building as a private garage. Respondent further answering says that the relator did not disclose to the Inspector of Buildings nor to the Commissioners of the District of Columbia that it was his (relator's) intention to use said building as a public garage prior to its completion nor until the 17th day of July, 1909. Respondent submits that the erection of a public garage under a permit to construct a private garage is not and was not in this case a legal or proper use of the said permit.

3. Answering the third paragraph of said petition, respondent says that he does not admit that the said permit and license, or either of them was issued by the Fire Marshal or respondent to the relator to instal a tank for the purpose of storing gasoline pursuant to any general intention on the part of the relator disclosed to the Fire Marshal or the respondent to establish a garage to be used as a private or public garage as the relator might elect. The said permit was issued March 6, 1909, and the said license was issued on the 1st day of May, 1909, on the supposition and belief that the

11 relator was acting solely under his permit to erect and use said building as a private garage, which was then the only

purpose of relator disclosed by the official records, or then known to any of the official- of the District of Columbia.

4. This respondent admits the allegations of the fourth paragraph of said petition and says that said garage is now conducted as a public garage, but respondent does not admit that the relator did not purpose, and had not arranged, when he made the application and received his permit to build a private garage, to use the same as a public garage contrary to the building regulations having force of law in the District. This respondent is advised and therefore avers that the use of said building as set forth in said paragraph is illegal, unlawful and unauthorized, and should not in the public interest be allowed to continue.

5. Answering paragraph five of said petition respondent says that on the 9th day of June, 1909, A. S. J. Atkinson, Assistant Inspector of Buildings reported to the Inspector of Buildings, "That the one-story brick private garage which was erected on lot 43, Square 2558, in the rear of No. 2118 Eighteenth Street, N. W., under permit No. 2303, issued December 17, 1908, has been converted into a public garage without a permit having been obtained for the same." Thereupon the said report was on June 9, 1909, duly forwarded to the Major and Superintendent of Police with the result that the said warrant was issued as alleged; whereupon the petitioner applied to the Police Court from time to time for continuances of said cause,

12 which were granted him, and on the 20th day of July, 1909, at the instance of the relator, the Police Court indefinitely continued said cause, because of the application to be made for mandamus by relator against the Building Inspector. Respondent shows to the court that at the time of the institution of said proceedings in the Police Court and as shown by the relator in paragraph 4 of his said petition, the said building had been used as a public garage without permit therefor, and contrary to the building regulations. Respondent says that the Commissioners of the District of Columbia on the 7th day of November, 1906, passed, made and duly published a building regulation known as Sec. 143a of the Building Regulations, which reads as follows:

"No automobile or locomobile livery stable, or building wherein automobiles are to be stored, put up, or kept for hire, or otherwise, shall be erected, located, established or maintained upon any residence street or avenue in the District of Columbia without the written consent of the owners of 75 per centum of the property within 200 feet of the proposed establishment (excepting property used for purposes requiring consent of property owners); strictly private establishments of this character located not less than fifty feet back from the front building line of the lot will be excepted from this regulation. No public automobile or locomobile livery stable, or building wherein automobiles or locomobiles are to be stored, put up, or kept for hire, or otherwise (excepting strictly private establishments) shall be erected, located, established or maintained upon property fronting upon a public alley without the written
13 consent of the owner or owners of two-thirds of the property not occupied wholly or in part for business purposes within

90 feet of the outline of the building or part of building erected or used therefor. The 90 feet herein mentioned shall not be construed as extending beyond the limits of the square in which said automobile or locomobile livery stable is proposed to be erected."

Respondent avers that said building regulation was in force and known to be in force by the relator when he made his application for permit to construct his said building as a private garage and when he obtained his permit to construct his said building thereunder; and was also in force when he commenced to use said building as a public automobile stable or garage and when he made his second application for a permit to occupy his said building as a public automobile stable or garage on the 16th day of July, 1909.

Further answering respondent says that the relator with said knowledge of said regulation did apply for a permit on or about the 17th day of July, 1909, to operate said building as a public automobile livery stable or garage; that said use is not a private use and said establishment would not be a strictly private establishment; that as such public garage or public automobile livery stable, automobiles or locomobiles, or both, were prior to said application, and would be, under such permit if granted, kept for hire; that the said

14 property fronts upon a public alley and is surrounded by residences and buildings which are used wholly or in part for business purposes, within the 90 feet restriction mentioned in said regulations; and that said application was not accompanied with, and relator did not have, the written consent of the owner or owners of two-thirds of the property not occupied wholly or in part for business purposes within ninety feet of the outline of the building erected and used therefor, within said square.

Respondent further shows that said application for permit was not made for the purpose of repairing said building, nor for the purpose of having anything done in and about the same, but was solely made "to secure a permit to occupy the above described building as a public garage," as expressed in said application.

Respondent further says that on, to wit, the 24th day of July, 1909, the relator instituted proceedings by mandamus against the Building Inspector of the District of Columbia to compel the issuance of a permit to the relator to conduct his said garage as a public garage; that said case proceeded to hearing on the petition and the answer of the Building Inspector thereto, and was, by the Court, on, to wit, December 10, 1909, dismissed. Thereafter the relator again procured an indefinite continuance of the aforesaid case against him in the Police Court, for the purpose of allowing him to institute this case.

6. Respondent admits the allegations of the sixth paragraph and says that on, to wit, the 18th day of October 1909, the Commissioners of the District of Columbia duly promulgated the following as Section 160*b* of the Building Regulations which has been
15 in force since the 15th day of November 1909, and was in force at the time of the application to respondent for the license as alleged, and that Section 143*a* of the Building Regulations

hereinbefore set out was in force and effect from the 7th day of November, 1906, until said Section 160*b* went into effect. Said Section 160*b* is as follows:

"SEC. 160*b*. No automobile or locomobile livery stable, or building wherein automobiles are to be stored, put up, or kept for hire, or otherwise, shall be erected, located, established, or maintained upon any residence street or avenue in the District of Columbia without the written consent of the owners of 75 per cent of the property within 200 feet of the proposed establishment (excepting property used for purposes requiring consent of property owners); strictly private establishments of this character located not less than fifty feet back from the front building line of the lot will be exempted from this regulation. No public automobile or locomobile livery stable, or building wherein automobiles or locomobiles are to be store, put up, or kept for hire, or otherwise (excepting strictly private establishments), shall be erected, located, established, or maintained, upon property fronting upon a public alley or upon a business street or avenue where the rear of the property, on which any such stable is to be erected, located, established, or maintained, opens upon a street or alley, or upon property used wholly or partly for residential purposes without the written consent of the owner or owners of two-thirds of the property not occupied wholly
16 or in part for business purposes within 90 feet of the outline of the building or part of the building to be erected or used therefor. The 90 feet herein mentioned shall not be construed as extending beyond the limits of the square in which said automobile or locomobile livery stable is proposed to be located."

7. Answering the seventh paragraph of the said petition, respondent says that the building is suitable for a private garage and can be used as such; that it is suitable for many other purposes, such as storage, as a stable and other business purposes; that relator is not deprived of the use and benefit of his said building as originally erected and planned, and that he does not need and has not been required to obtain consents of other property owners for the use of said building as stated in the application to build it and in the permit granted him to build it.

8. Answering paragraph eight of said petition and further answering said petition generally, this respondent says that there is no duty imposed upon him by law, regulation, or otherwise, to issue to petitioner the license applied for by him; respondent says that the issuance of any such license would be a violation of his duty under said law and regulation. He further says that the relator is not deprived of any substantial right or privilege by the withholding of said license, even if relator should be technically entitled to the issuance thereof, for the reason that the building regulations prohibit
relator from conducting a public garage at the place men-
17 tioned in said petition, which said place is also mentioned in his application for license, and relator cannot legally conduct the same.

And having fully answered respondent prays that the said petition

may be dismissed and the rule to show cause issued against him may be discharged.

WM. P. RICHARDS,
Assessor, D. C.

DISTRICT OF COLUMBIA, ss:

William P. Richards, being first duly sworn, on oath says that he has read the foregoing answer by him signed and knows the contents thereof; that the facts therein stated on his own knowledge are true and those stated on information and belief he believes to be true.

WM. P. RICHARDS.

Subscribed and sworn to before me this — day of January, A. D. 1910.

[SEAL.]

BENJAMIN F. ADAMS,
Notary Public, D. C.

(Endorsed.)

Let this answer be filed in the place of the one heretofore filed which latter may be withdrawn.

WRIGHT, *Justice.*

18

Demurrer.

Filed February 15, 1910.

* * * * *

The petitioner says that the respondent's return is bad in substance.

JAMES B. FLYNN,
C. ALBERT WHITE,
Attorneys for Petitioner.

NOTE.—The following points of law will be argued at the hearing of this demurrer:—

(1) That the answer of the respondent in no way justifies his action in refusing the license herein prayed for and shows that he has no discretion in the matter, for the reason that by the provisions of paragraph 1 of section 7 of Chapter 1352 of an Act of Congress approved July 1, 1902, it is the duty of respondent to issue to relator the license herein prayed for and that section 160b of the Building Regulations of the District of Columbia, the non-compliance with which by relator is relied upon by respondent as a reason for refusing said license, is unlawful, illegal, and unreasonable, and therefore null and void.

FRIDAY, *February 18th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Claibagh, Chief Justice, presiding.

* * * * *

Comes now the respondent by his attorney herein, and withdraws his demurrer filed herein February 13th, 1910, to the traverse herein.

Thereupon this cause is heard upon the petition, rule to show cause and answer of respondent and demurrer of petitioner thereto, whereupon it is ordered, upon consideration thereof that said demurrer be, and the same is hereby overruled. Whereupon petitioner elects to stand upon said demurrer and it is considered that the Rule to Show Cause issued herein be, and the same is hereby discharged and the petition dismissed at the costs of petitioner, for which defendant shall have execution.

From the foregoing, the petitioner by his attorney in open Court, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of a bond for costs on said appeal is hereby fixed in the sum of Fifty dollars.

Memorandum.

March 7, 1910.—Appeal bond filed.

20 *Directions to Clerk for Preparation of Transcript of Record.*

Filed March 7, 1910.

* * * * *

The clerk will please include in the transcript of the record of the above entitled cause on appeal to the Court of Appeals the following papers:

1. The Petition.
2. The Rule to Show Cause.
3. The Answer.
4. The Demurrer to Answer.
5. Judgment dismissing petition, etc.
6. Memo: Appeal bond for Costs for \$50 filed March 7th, 1910.
7. This Precipe.

JAMES B. FLYNN,
C. ALBERT WHITE,
Attorneys for Petitioner.

21 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52287 at Law, wherein the United States of America, on the relation of Charles Early, is Relator, and William P. Richards, Assessor of the District of Columbia, is Respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of April 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2154. The U. S. ex rel. Charles Early, appellant, vs. William P. Richards, assessor of the District of Columbia. Court of Appeals, District of Columbia. Filed Apr. 19, 1910. Henry W. Hodges, clerk.

COURT OF APPEALS
~~DISTRICT OF COLUMBIA~~
FILED

OCT-4--1910

IN THE

Henry W. Hodges
Book.
Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2154.

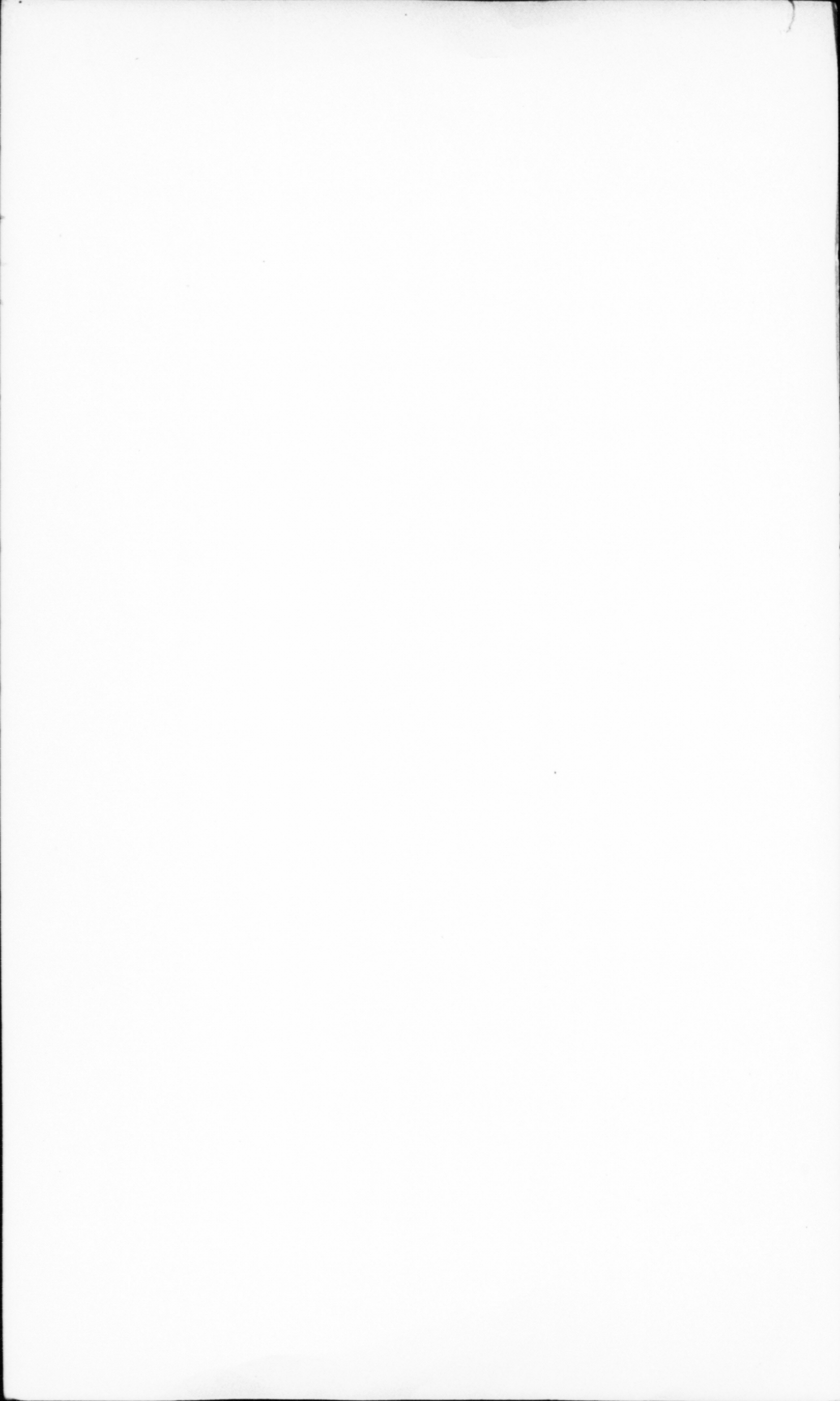
THE UNITED STATES OF AMERICA EX REL.
CHARLES EARLY, APPELLANT,

vs.

WILLIAM P. RICHARDS, ASSESSOR OF THE DISTRICT OF
COLUMBIA, APPELLEE.

BRIEF FOR APPELLEE.

E. H. THOMAS,
WM. HENRY WHITE,
Attorneys for Appellee.



IN THE
Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2154.

THE UNITED STATES OF AMERICA EX REL.
CHARLES EARLY, APPELLANT,

vs.

WILLIAM P. RICHARDS, ASSESSOR OF THE DISTRICT OF
COLUMBIA, APPELLEE.

BRIEF FOR APPELLEE.

Statement of Facts.

This is an appeal from a final order overruling a demurrer to the answer to a petition for a writ of mandamus and, upon petitioner's electing to stand upon his demurrer, finally dismissing the rule to show cause and petition. The facts disclosed by the petition and answer follow:

Petitioner is the owner of premises shown to be an entire lot fronting on a public alley fifteen feet wide and not connected with a street, and has been such owner since before the happening of any of the facts herein recited. On De-

cember 14, 1908, he made application to the Inspector of Buildings to build a private garage (not a public garage) on said lot. A permit was granted to erect a private garage, under which a building was erected and completed on May 19, 1909. There has not been any interference with petitioner in conducting a private garage in said building.

Without disclosing his intention to use said building as a public garage at the time of making application for the permit to construct it, or at any other time, petitioner converted it into a public garage at or about the time it was completed, and on June 10, 1909, information was filed against him in the police court charging him with operating a public garage without having a license therefor, in violation of the act of Congress approved July 1, 1902, known as the personal-tax law. This cause in the police court was continued to allow petitioner to institute proceedings by mandamus in the Supreme Court of the District of Columbia against the Building Inspector to compel the issuance of a permit to conduct a public garage in said building. This cause was heard on petition and answer and was dismissed on December 10, 1909; whereupon the police court cause was further continued and is still pending.

On December 22, 1909, he made application to the Assessor of the District of Columbia, respondent herein, for a license to operate a public garage in said building, and tendered the requisite fee for the license, which the assessor temporarily kept and returned on January 8, 1910, when he refused to issue the license. Petition was then filed asking for the writ of mandamus against the assessor to compel the issuance of the license, which was answered by respondent. To this answer petitioner demurred, the demurrer was overruled, and petitioner elected to stand on his demurrer; whereupon the petition was dismissed.

At the time of the application for permit to build, and during the time of the construction of the building, and the conversion thereof from a private garage into a public

garage, section 143a of the building regulations was in force, which reads as follows:

"SEC. 143a. No automobile or locomobile livery stable, or building wherein automobiles are to be stored, put up, or kept for hire, or otherwise, shall be erected, located, established or maintained upon any residence street or avenue in the District of Columbia, without the written consent of the owners of 75 per centum of the property within 200 feet of the proposed establishment (excepting property used for purposes requiring consent of property owners); strictly private establishments of this character located not less than fifty feet back from the front building line of the lot will be excepted from this regulation. No public automobile or locomobile livery stable, or building wherein locomobiles or automobiles are to be stored, put up, or kept for hire, or otherwise (excepting strictly private establishments) shall be erected, located, established or maintained upon property fronting upon a public alley without the written consent of the owner or owners of two-thirds of the property not occupied wholly or in part for business purposes within 90 feet of the outline of the building or part of building erected or used therefor. The 90 feet herein mentioned shall not be construed as extending beyond the limits of the square in which said automobile or locomobile livery stable is proposed to be erected."

At the time of the application for the license under the personal tax law the building regulations had been amended and given a new number, so that the regulation which was then and still is in force is as follows:

Section 160b of the Building Regulations, D. C.

"SEC. 160b. No automobile or locomobile livery stable or building wherein automobiles or locomobiles are to be stored, put up, or kept for hire, or otherwise, shall be erected, located, established or maintained upon any residence street or avenue in the District of Columbia without the written consent of the owners of 75 per centum of the property within 200 feet of the proposed establishment (excepting property used for purposes requiring consent of property owners); strictly private establishments of this character located not less than fifty feet back from the front building line of the lot will be exempted from this regulation. No public automobile or locomobile livery stable, or building where automobiles or locomobiles are to be stored, put up, or kept for hire, or otherwise (excepting strictly private establishments), shall be erected, located, established, or maintained upon property fronting upon a public alley or upon a business street or avenue, where the rear of the property, on which any such stable is to be erected, located, established or maintained, opens upon a street or alley, or upon property used wholly or partly for residential purposes without the written consent of the owner or owners of two-thirds of the property not occupied wholly or in part for business purposes within 90 feet of the outline of the building or part of the building to be erected or used therefor. The 90 feet herein mentioned shall not be construed as extending beyond the limit of the square in which said automobile or locomobile livery stable is proposed to be located.

Petitioner has never procured written consent of the requisite number of owners of property under either of the above regulations, and for this reason the assessor refused to issue the license.

ARGUMENT.

I.

First Assignment of Error.

Appellant's first assignment of error asserts, in effect, that the building regulations are an attempt on the part of the Commissioners to amend the personal tax law. A perusal of that act and of the regulations will show that this assignment is untenable.

Section 6 of the act states its purposes as follows:

"That in order to provide revenues to meet the appropriations made by this act and appropriations to be hereafter made to provide for the expenses of the Government of the District of Columbia, it is further enacted etc."

Section 7 begins:

"That no person shall engage in or carry on any business, trade, profession, or calling in the District of Columbia for which a license tax is imposed by the terms of this section without having first obtained a license so to do. Applications for license shall be made to the Assessor of the District of Columbia, and no license shall be granted until payment for the same shall have been made. Every license shall specify by name the person, firm or corporation to which it shall be issued, the business, trade, profession or calling for which it is granted, and the location at which such business, trade, profession or calling is to be carried on. * * * All licenses and transfers issued or granted shall be signed by the Assessor of the District of Columbia and im-

pressed with the seal of his office * * * provided that license issued under any of the provisions of this act shall be good only for the location designated thereon."

Paragraph 5 of this section provides that all licenses granted under the terms of this section must be conspicuously posted on the premises of the licensee.

Paragraph 13 provides:

"That proprietors or owners of establishments where auto-vehicles of any pattern, description, or motor power whatsoever are kept for hire or are kept or stored for others, for profit or gain, shall pay a license tax of twenty-five dollars per annum for ten vehicles or less and two dollars additional for each vehicle in addition to ten; *Provided*, that nothing in this paragraph shall be so construed as to exempt the owner of any vehicles using the public stands from paying the additional license tax provided in paragraph eleven of this section."

Paragraph 48 also provides:

"That nothing in this section shall be interpreted as repealing any of the police or building regulations of the District of Columbia regarding the establishment or conducting of the businesses, trades, professions, or callings herein named."

Paragraph 47 provides a penalty and gives the police court jurisdiction.

The answer (Record, 6) shows that section 143a of the building regulations prohibited the conduction of this business without the requisite consents, and while not in force at the time the act of July 1, 1902, was passed, it was in force at the time of the construction of petitioner's building.

Section 160*b* of the building regulations contained a like prohibition and was in force at the time of the application for a license.

A reasonable construction of the last proviso (par. 48) mentioned in the above act is that it was not the purpose of Congress to take away from the Commissioners any of the general powers, theretofore granted them, in relation to police and building regulations; indeed, such an inference could hardly be drawn from the mere requirement by the act of certain written consents of property owners for certain other businesses, such as shooting galleries, etc. (par. 27). The grant of power to the Commissioners in relation to the police and building regulations have continued for so long, have been so often considered by the courts, are so necessary in the administration of the affairs of the municipality that such a result could be brought about only by the plainest language of the national legislature.

Nor does the refusal to grant a license to conduct a business in a place and under conditions, the carrying on of which business is prohibited at such place and under such conditions by valid regulations, authorize the issuance of a writ of mandamus to compel the issuance of a license.

The license-tax law on which petitioner bases his claim is a revenue law. It does not take away the power of regulation either in terms or by implication. "The right given by the license is a qualified and not an absolute right."

Paragraph 13 is general in its language, providing—

"That proprietors or owners of establishments where auto-vehicles * * * are kept for hire or are stored for others for profit or gain shall pay a license tax of twenty-five dollars per annum,"

and while the first paragraph of this section 7 provides—

"That every license shall specify by name the person, firm or corporation to which it shall be issued,

the business, trade, profession, or calling for which it is granted, and the location at which such business, trade, profession or calling is to be carried on,"

there is no authority, expressed or implied, in the act for any person to have a license to carry on a business in any particular building, locality, or condition. *A fortiori* where the carrying on of such business in the building, locality, or under the conditions named in the application and required by law to be named in the license is prohibited by the plain mandate of the building regulations having force and effect of an act of Congress.

Good faith to the applicant requires of the municipal authorities that a license should be refused in such cases, else his money would be received, turned into the Treasury of the United States, and he could not be permitted to carry on the business.

In the case of *District of Columbia vs. Shong Lee* (XXXVIII, W. L. R., 460, 461), decided in this court on May 26, 1910, the contention was made that a valid regulation passed by the Commissioners under the police power requiring the proprietor of a hand laundry to make certain written reports to the health officer was in conflict with the personal-tax law. The whole question is decided by this court in the following language:

"Is the regulation under consideration in conflict with said act of July 1, 1902? The requirement in said act that the proprietor of a hand laundry shall pay an annual license tax is for the purpose of revenue. The object of a municipal regulation is the protection of public health. There is no reason, therefore, why a regulation may not be sustained, unless it is so clearly unreasonable and oppressive as to be outside the police powers of the municipality. *A license issued under said act does not authorize the holder to conduct a laundry regardless of such reason-*

able police regulations as may be enacted for the protection of the people against the spread of contagious diseases, nor does it authorize the holder to maintain a nuisance. In other words, the right conferred by the license is a qualified and not an absolute right."

The court also points out that this same rule was declared in *Barbier vs. Connolly* (113 U. S., 27); *Soom Hing vs. Crowley* (113 U. S., 703), and *Strasburger vs. Commissioners* (5 Mackey, 389).

The provision in section 7 of the license act of 1902, "That no person shall engage in or carry on any business, trade, profession, or calling in the District of Columbia for which a license tax is imposed by the terms of this section without having first obtained a license so to do," is not new. A similar provision is contained in the license act of August 23, 1871, passed by the late legislative assembly.

The first section of that act states "That no person shall be engaged in any trade, business, or profession hereinafter mentioned until he shall have obtained a license therefor, as hereinafter provided."

In the *Strasburger* case last cited, decided February 7, 1887, over twenty-three years ago, the Commissioners declined to transfer the *license* and also cancelled a permit for non-compliance with a building regulation, passed after the granting of both the license and permit, and were sustained in their action.

A similar provision will also be found in the license law governing the corporation of Washington (*Webb's Digest*, 243), and it is believed that such provision is common to all license acts and ordinances. The license act of 1902, and similar acts, do not make the transaction of business without a license illegal or criminal, nor do they provide for the location of the business. The contracts and acts

done without a license are lawful and subject the violator to a mere penalty for the non-procurement of the license.

Building and police regulations serve a different object. They are addressed to the exercise of particular powers vested in the Commissioners by acts of Congress which are not inconsistent nor repugnant to the license act and are in harmony with it. That licensing of hotels, livery stables, coal, wood, and lumber yards, and other business enterprises has been practised in this District since 1820 under charter power which did not deal with their location or assent of neighbors, while ordinances passed under these charters which dealt with location and assent of neighbors have been long considered lawful without question is pointed out in the Strasburger case.

If the license act of 1902 gives a vested right to every person to do business without supervisory regulation, as the counsel for appellant, in effect, contend, then Congress has, by that act, taken away the police powers granted to the Commissioners.

We believe that such an absurd result cannot be reasonably urged in support of a mere revenue law passed in exercise of the taxing power. The act of Congress, July 1, 1902, creates a tax. The building regulation is an exercise of police power.

The act of the legislative assembly passed August 23, 1871, which is enlarged by the act of 1902, has been treated as a tax law (*Washington Electric Vehicle Transportation Co. vs. District of Columbia*, 19 App. D. C., 462), and so has the act of 1902 (*Beitzell vs. District of Columbia*, 21 App. D. C., 49). Physicians and plumbers (by way of contrast and for example) have a lawful right to pursue their occupations and to be licensed to do so and cannot be denied this right under the constitution. But these callings are the subject of regulations made pursuant to the police power.

The right to keep a public garage is certainly no greater

than the right to practice medicine or to pursue the calling of a plumber, nor is it superior to the right to operate a railroad by virtue of a charter.

II.

Second Assignment of Error.

The second assignment of error raises squarely the question of the validity of section 160*b* of the building regulations and is the real question in the case: Is that regulation "an attempted delegation" by the Commissioners of the power vested in them by Congress?

This assignment of error admits that if the building regulation is valid, the assessor was bound to refuse the license. This must be so; otherwise the assessor would act in violation of the law if he issued such a license. The question arises, therefore, whether this is a valid regulation.

Examination shows that the following cases cited in applicant's brief under the second assignment of error are not in point: *Metropolitan Railroad Company vs. District of Columbia* (132 U. S., 1); *Daly vs. Macfarland* (28 App. D. C., 552); *Ex parte Sing Lee* (96 Cal., 364); *Jacksonville vs. Ledwith* (26 Fla., 163); *Kerr vs. Ross* (5 App. D. C., 241); *D. C. vs. Weston* (23 App., 363); *Thompson vs. Schermorhorn* (6 N. Y., 92), and the cases next cited.

The case in 74 New York and 58 Alabama are, as applied to this case, mere academic dissertations on the subject "due process of law." The citation from Tiedeman points out the well-known possibility of abuse in the exercise of police power by municipalities. *Moore vs. D. C.* (12 App.) states the "settled principle that municipal ordinances or regulations cannot enlarge or change the legislative grant of power to the municipal agency." *Dobbins vs. Los Angeles* (195 U. S., 169) asserts the undisputed power of courts to review municipal ordinances and by-laws. The authorities on pages

15, 16, 17 and 18 are mere statements of the general propositions of law that the maintenance of a garage along a boulevard is not a nuisance *per se*; that a municipal legislature cannot declare a specific thing to be a nuisance which is not a nuisance *per se*; that as to other things which may or may not be nuisances, depending upon how they are conducted, a court of equity will not grant a preliminary injunction order, preferring to wait until the fact is decided rather than to depend upon the "fears of mankind;" and that mandamus is the proper remedy for the plaintiff if entitled to relief.

There is left for consideration two cases cited in applicant's brief, namely: *City of St. Louis vs. Russell* (116 Missouri, 248); and the laundry ordinance case in the matter of *Quong Woo* (7 Sawyer, 526).

The Missouri case was reviewed and distinguished in *Chicago vs. Stratton* (162 Ill., 494), (35 L. R. A., 84, 87), as follows:

"The case of *St. Louis vs. Russell*, 116 Mo., 248; 20 L. R. A., 721, is relied upon as announcing a different view of the present question from that which is here expressed, but the ordinance condemned in that case provided that no livery stable should 'be located on any block of ground in St. Louis without the written consent of the owners of one-half the ground of said block.' It will be noticed that in the Missouri case the ordinance requiring the consent of adjacent property-owners related to the entire city. Under the operation of such an ordinance livery stables might be totally suppressed and prohibited everywhere within the municipal limits. The ordinance, however, in the case at bar is not thus unreasonable, as it relates only to certain residence districts, which are clearly defined. Within such specified residence districts, the city council undoubtedly has the power to prohibit or forbid the

location of livery stables, and, having the power of total prohibition within those districts, it may impose such conditions and restrictions in relation to their limited area as it may see fit. For the reasons stated we are of the opinion that the ordinance here in question is not void as being a delegation of legislative power, and that the circuit court erred in not holding as law the propositions submitted to it as the same are set forth in the statement preceding this opinion."

Our regulation, like the Chicago ordinance, prohibits the maintenance of garages "upon any residence street or avenue." The first regulation, 143*a*, as applied to garages in alleys can have no application and contains no prohibition except the property in the alley is used "wholly or in part for business purposes," and the same is true of section 160*b*, as its limitation is to a "public alley * * * used wholly or partly for residential purposes."

This right to discriminate, by regulation, between business streets and residence streets is settled.

Welch vs. Swasey, 214 U. S., 91.

The court in this case reviewed the act of the Massachusetts legislature creating a commission and directing it to divide the city of Boston into two districts, A and B, the boundaries to—

"be determined in such manner that those parts of the city in which all or the greater part of the buildings situate therein are, at the time of such determination, used for business or commercial purposes, shall be included in the district or districts designated A, and those parts of the city in which all or the greater part of the buildings situate therein are, at the said time, used for residential purposes or for

other purposes not business or commercial shall be in the district or districts designated B.

“No building shall be erected to a height of more than 125 feet above the grade of the street in any district designated A, and no building shall be erected to a height of more than eighty feet above the grade of the street in any district designated B.”

The court in its opinion said:

“We are not prepared to hold that this limitation of 80 to 100 feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination thus made is, as we think, reasonable, and is justified by the police power.

“It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion. This court is not familiar with the actual facts, but it may be that, in this limited commercial area, the high buildings are generally of fire-proof construction; that the fire engines are more numerous and much closer together than in the residential portion, and that an unlimited supply of salt water can be more readily introduced from the harbor into the pipes, and that few women or children are found there in the daytime, and very few people sleep there at night. And there may, in the residential part, be more wooden buildings, the fire apparatus may be more widely scattered, and so situated that it would be more difficult to obtain the necessary amount of water, as the residence quarters are more remote from

the water front, and that many women and children spend the day in that section, and the opinion is not strained that an undiscovered fire at night might cause great loss of life and property in a high apartment house in that district. There are matters, which it must be presumed, were known by the legislature, and whether or not such were the facts was a question, among others, for the legislature to determine. They are asserted as facts in the brief of the counsel for the city of Boston. If they are, it would seem that ample justification is therein found for the passage of the statutes, and that the plaintiff in error is not entitled to compensation for the reasonable interference with his property rights by the statutes. That, in addition to these sufficient facts, considerations of an esthetic nature also entered into the reasons for their passage, would not invalidate them. Under these circumstances there is no unreasonable interference with the rights of property of the plaintiff in error, nor do the statutes deprive him of the equal protection of the laws. The reasons contained in the opinion of the State court are, in our view, sufficient to justify their enactment" (214 U. S., 930, '1).

The Illinois Supreme Court (*Chicago vs. Stratton, supra*) cites with approval the following from Dillon on Municipal Corporations:

"The principle is a plain one, that the public powers of trust devolved by law or charter upon the council or governing body, to be exercised by it under and in such manner as it shall judge best, cannot be delegated to others."

The court then says:

“It is to be noticed that the ordinance does not prohibit the location or construction or keeping of livery stables in blocks which are vacant or where the buildings are devoted to business purposes or where less than two-thirds of the buildings are devoted to exclusive residence purposes. * * * There is a general prohibition against the location of livery stables in blocks where two-thirds of the buildings are devoted to exclusive residence purposes, and then an exception to the prohibition is created in favor of blocks of the class designated where a majority of the lot owners consent in writing to the location of a livery stable there. We are unable to see how this exception amounts to a delegation by the Common Council of its power. * * * The prohibition against the location of a livery stable in the residence blocks is for the benefit of those who reside there. If those for whose benefit the prohibition is created make no objection to the location of such a stable in their midst, an enforcement of the prohibition as to that block would seem to be unnecessary. By section 49 the lot owners are not clothed with the power to locate livery stables, but are merely given the privilege of consenting that an existing ordinance against the location of a livery stable in such a block as theirs may not be enforced as against their block. They are simply allowed to waive the right to insist upon the enforcement of a legal prohibition which was adopted for their benefit and comfort. It is competent for the legislature to pass a law the ultimate operation of which may, by its own terms, be made to depend upon a contingency. *People ex rel. Grinnell vs. Hoffman*, 116 Ill., 587; 56 Am. Rep., 793, and cases cited. As was

said by the Supreme Court of Pennsylvania in Locke's appeal, 72 Pa., 491; 13 Am. Rep., 716; 'The true distinction is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.' In the case at bar the ordinance provides for a contingency, to wit, the consent of a majority of the lot owners in the block, upon the happening of which the ordinance will be inoperative in certain localities. The operation of the ordinance is made to depend upon the fact of the consent of a majority of the lot owners, but the ordinance is complete in itself as passed. What are known as 'local option laws' depend for their adoption or enforcement upon the votes of some portion of the people, and yet are not regarded as delegations of legislative power. 13 Am. and Eng. Enc. Law, p. 991. Delegation of power to make the law is forbidden, as necessarily involving a discretion as to what the law shall be; but there can be no valid objection to a law which confers an authority or discretion as to its execution, to be exercised under and in pursuance of the law itself. *Cincinnati, W. & Z. R. Co. vs. Clinton County Com'rs*, 1 Ohio St., 77. Here the provision in reference to the consent of the lot owners affects the execution of the ordinance rather than its enactment. *People, Wilson vs. Solomon*, 51 Ill., 37; *Bull vs. Read*, 13 Gratt., 78; *The Aurora vs. U. S.*, 11 U. S., 7 Cranch, 382; 3 L. Ed., 378; *Alcorn vs. Hamer*, 38 Miss., 652. The ordinance in question does not delegate to a majority of the lot owners the right to pass or even approve of it. On the contrary, their consent is in the nature of a condition subsequent which may defeat the op-

eration of the prohibition against the location of a livery stable in a block where two-thirds of the buildings are devoted to exclusive residence purposes, but which was never intended to confer upon the ordinance validity as an expression of the legislative will. *Alcorn vs. Hamer, supra.* The express grant of the power to direct the location of livery stables, as made by the legislature to the municipal corporation, carries with it all necessary and proper means to make the power effectual. *Huston vs. Clark*, 112 Ill., 344. In other words a grant of legislative power to do a certain thing carries with it the power to use all necessary and proper means to accomplish the end; and the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. *Chicago, B. & Q. R. Co. vs. Jones*, 149 Ill., 361; 24 L. R. A., 141; 4 Inters. Com. Rep., 683. In determining the question of the location of a livery stable the common council may properly consult the wishes and ascertain the needs of the residents of the block where the stable is to be kept, and to that end make their written consent the basis of the action of the commissioner of buildings in issuing the permit. In matters of purely local concern the parties immediately interested may fairly be supposed to be more competent to judge of their needs than any central authority. *Cooley, Const. Lim.*, 6th Ed., p. 138. In *Meyers vs. Baker*, 120 Ill., 567; 60 Am. Rep., 580, there was involved the question of the validity of a section of the Criminal Code, which provides that 'whoever, during the time of holding any camp or field meeting for religious purposes, and within one mile of the place of holding such meeting, hawks or peddles goods, wares, or merchandise, or, without the permission of the authori-

ties having charge of such meeting, establishes any tent, booth, or other place for vending provisions or refreshments, or sell or gives away, or offers to sell or give away, any spirituous liquor, wine, cider, or beer, or practises or engages in gaming or horse racing, or exhibits or offers to exhibit any show or play, shall be fined,' etc. Ill. Rev. Stat., chap. 38, sec. 59. In that case we held that 'the rule which would control an ordinance would also apply to an act of the legislature,' and that the statute did 'not confer the power to license on the authorities in charge of the meeting,' and we there said: 'The fact that the act confers on the authorities the right to consent, or refuse consent, cannot be held to authorize such authorities to license. The right to consent, or refuse consent, is one thing, while the right or power to license a person to conduct a certain business at a certain place is quite a different thing. Had the legislature intended to authorize the authorities to license, language expressing that intention in plain words would no doubt have been used. But, however this may be, we see nothing in the language of the act which can be construed as authorizing the authorities to license.' Where an annexation act of the legislature provided that when territory was annexed to a city under the provisions of that act, and, prior to such annexation, there were in force ordinances providing that licenses to keep dram shops should not be issued except upon petition of a majority of the voters residing within a certain distance of the location of such proposed dram shop, it was held that such ordinance still remained in force after the annexation, and that it was not unreasonable." (Chicago vs. Stratton, 35 L. R. A., 86 & 87.)

In *Martins vs. People*, 186 Ill., 314, it was held that an ordinance requiring the consent of two-thirds of the persons owning property in a block for the establishment of a saloon is not invalid. The case of *Chicago vs. Stratton* is affirmed and the case of *Patterson against Johnson* decided in 114 Ill. App., 329, and affirmed in 214 Ill., 481, is to the same effect as applied to a blacksmith shop.

In *Fouts vs. Hood River*, 1 L. R. A. (N. S.), 483 (Oregon Supreme Court), the local option principle as applied to dram shops was under consideration and, after citing cases to the effect that among the early adjudications contrary opinions were expressed, the local option principle was affirmed as constitutional and not a delegation of the powers of the legislature. Numerous cases are reviewed which hold uniformly that where the law is perfect in all its parts as it comes from the hands of the legislature and where the election is prescribed by the law and not by the people to determine its *application* and *limitation*, and where "the expressed will of the people is but an appropriate contingency upon which the law shall depend for its operation," there is no delegation of authority.

"When the law came from the halls of legislation it came a perfect law, mandatory in all its parts, prohibiting in this ward the sale of intoxicating liquors without license, commanding an election to be held every third year to ascertain the expediency of issuing licenses, and, when the fact of expediency or in expediency shall have been returned commanding that licenses shall issue or shall not issue, then what did the vote decide? Clearly not that the act should be a law or not be, for the law already existed. Indeed, it was not delegated to the people to decide anything. They simply declared their views or wishes and when they did so it was the fiat of the law, not their vote, which commanded licenses to be issued or not to be

issued. So long, therefore, as the legislature only calls to its aid the means of ascertaining the utility or expediency of a measure and does not delegate the power to make the law itself, it is acting within the sphere of its just powers."

The above, it will be noted, is copied by the Oregon Supreme Court from *Locke's Appeals*, 72 Pa., 491, and the court further says:

"It is not the election that breathes into the act its validity or vitality * * * but the election does designate or determine the contingency upon which prohibition shall become operative or not, according to the popular will in the locality or localities where invoked."

The building regulation attacked here does not approach so near a delegation of legislative authority as the ordinance reviewed in the two cases of *Barbier vs. Connolly*, 113 U. S., 27, and *Soon Hing vs. Crowley*, 113 U. S., 703. In these cases the ordinance was sustained as valid. It provided that—

"It shall be unlawful for any person to establish, maintain or carry on the business of a public laundry or of a public wash-house within certain designated limits of the city and county, without first having obtained a certificate signed by the health officer of the municipality, that the premises were properly and sufficiently drained, and that all proper arrangements were made to carry on the business without injury to the sanitary condition of the neighborhood; also a certificate signed by the board of fire wardens of the municipality, that the stoves, washing and drying apparatus and the appliances for heating smoothing irons were in good condition,

and that their use was not dangerous to the surrounding property from fire, and that all proper precautions were taken to comply with the provisions of the ordinance defining the fire limits of the city and county, and making regulations concerning the erection and use of buildings therein.

“The ordinance required the health officer and board of fire wardens upon application of any one to open or conduct the business of a public laundry, to inspect the premises in which it was proposed to carry on the business, in order to ascertain whether they are provided with proper drainage and sanitary appliances and whether the provisions of the fire ordinance have been complied with and, if found satisfactory in all respects, to issue to the applicant the required certificates without charge for the service rendered.”

Its fourth section declared that no person owning or employed in a public laundry or a public washhouse within the prescribed limits shall wash or iron clothes between the hours of 10 in the evening and 6 in the morning or upon any portion of Sunday. On page 32 the court said:

“In the case before us the proviso requiring certificates from the health officer and the board of fire wardens may, in some instances, be unnecessary, but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not the violation of any right of the individual.”

On page 30 the court says:

“The specification of the limits within which the business can not be carried on without a certificate from the health officer and board of fire wardens is

merely the designation of a portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions."

The identical question involved in this case was fully considered in the case of *Strasberger vs. the Commissioners*, 5 Mackey, 389, in which Judge Hagner delivered one of his ablest and most elaborate opinions. For the convenience of the court, we print substantially the whole of the opinion as an addenda and have also added some of the building and police regulations and reference to acts of Congress, recognizing and applying the local option principle continuously from 1861 to the present time.

In the *Strasberger* case petitioner had a *license* for a theater, which burned. He then was given a permit to change a skating rink into a theater building. The Commissioners next cancelled the permit to build, passed a regulation requiring the consents of a majority of residents in the square and confronting square, and because he did not get these consents refused a permit to build and refused to transfer the license. The action of the Commissioners was sustained by the court. Like that court (and all courts):

"We consider it safer to rely upon the analogies to be deduced from our own laws than to wander into foreign jurisdictions, and be guided by decisions based upon constitutions, statutes, and ordinances, to which we are strangers, and delivered in communities whose policy may be different from ours."

"It is evident that the present regulation of the Commissioners is in the direction of this settled policy,

and it is not to be forgotten that we are dealing here with a case where an application is made for an affirmative act to be done by the officers of a great city, who, it can scarcely be supposed, were intended by Congress to be reduced to mere automata, while the officers of every other municipality are endowed with such a measure of discretion in the premises as may enable them to protect their fellow citizens from such unreasonable demands, which may be made without regard for, and in opposition to, the wishes and the good of the great majority."

"It may be added that, by requiring the consent of the neighbors, the Commissioners have not turned over to those persons the exercise of any power in the premises. They have merely provided a means of ascertaining for themselves the propriety of allowing such a building to be erected in the proposed place."

Strasberger vs. Com., supra.

In the case of *District of Columbia vs. Lewis* (26 App. D. C., 133), this court recognized the principle announced in the *Strasberger* case and applied it to section 5 of the police regulations which prohibits the discharge of fire-arms, etc., in the city of Washington "without a special permit therefor from the major and superintendent of police," notwithstanding that such a regulation necessarily left it to the discretion of that officer to determine to whom and under what circumstances he would grant such permit, thus making it possible that as to two persons in a like situation one would be given a permit and the other would be refused. This is the principal criticism of such regulations.

"The contention is that the clause in question is not only a delegation of legislative powers to the superintendent of police, but also leaves the entire matter to his arbitrary discretion.

"We are of the opinion that the police court erred in sustaining the objections to the information. *The regulation itself contains the prohibition*, and delegates no such authority to the superintendent of police."

This court also held in terms—

"That the discretion committed to the superintendent of police in respect of granting permission to discharge fire-arms under certain conditions of necessity or expediency apparent to him, might, in instances, be arbitrarily exercised, does not render the regulation unreasonable and therefore invalid. *Barnes v. District of Columbia*, 24 App. D. C., 459-60."

D. C. vs. Lewis, supra.

We therefore respectfully submit that there is no error and that the judgment of the lower court should be affirmed.

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ADDENDA.

In the case of *Strasburger vs. Commissioners*, the facts are set out by the court as follows:

“The petition prays ‘that a writ of mandamus be issued by the court commanding the defendants, the said Commissioners of the District of Columbia, to show cause why they should not issue to the plaintiff a permit to repair and reconstruct the building hereinbefore mentioned, and also transfer his license for a theater from the corner of Ninth and D streets, northwest, to the said skating rink.’

“It sets forth that the petitioner had a license to carry on a theatrical business at the corner of Ninth and D streets, in the city of Washington; that this place of business was destroyed by fire, and in seeking for a place to pursue his avocation, he had found a building which had been used as a skating rink on E between Sixth and Seventh streets, which he conceived to be suitable; and he thereupon applied to the inspector of buildings for a permit to alter the rink to make it suitable for theatrical performances; and he also applied to have his license transferred, so that he could operate under it in the new place for the unexpired time; that on the 20th of December, 1886, the inspector of buildings issued the desired permit, which authorized him to make the alteration and stating expressly that the building, when altered, might be used for the purposes of a theater.

“The petition further states that on the same day the Commissioners undertook to cancel that permit and withdrew it; that he then applied to them to review their action; and that on or about the 29th

day of that month he received from the Commissioners a communication stating that they declined to order the permit to issue, unless he should comply with the provisions of a regulation which they had made on that day, and which required, as a condition precedent to the issue of a permit, that a majority of the residents in the square, and of those in the opposite square, fronting the designated place, should signify their approbation of the application; and that they also declined to order a transfer of the license."

After considering certain general questions in relation to the writ of mandamus the court continues:

"The petitioner insists that the acts he asks the court to order the municipal authorities to perform are plain, ministerial duties, which they are bound by the law to discharge upon his application; that there is no statute or lawful ordinance or regulation forbidding prompt compliance with his demand; and especially that the regulation of the 29th of December, 1886, is inoperative and void as an unauthorized and unreasonable exercise of municipal power.

"Is this contention correct?

"The act of June 14, 1878, seems to have been designed to confer upon the Commissioners a power with respect to building regulations of the most comprehensive character. It authorizes and directs the Commissioners 'to make and enforce' 'such building regulations for the said District as they may deem advisable'; and declares that 'such rules and regulations made as above shall have the same force and effect within the District of Columbia as if enacted by Congress.' There is no limitation as to the character or extent of the regulations thus authorized, but the terms are broad enough to include every form

of building regulations that the Commissioners may deem advisable, and which may reasonably be considered as a proper subject of regulation.

“It is evident that Congress intended to confer the power to make a complete system; and the words of the act are amply sufficient for that purpose. No such system would be complete that did not embrace the power of regulating the location of buildings with reference to the purpose for which they are to be used, as well as the character of the materials and the size and form of the structures. Such provisions as to location have always existed in Washington, and the public interest requires that they should be found in every municipal government. Unless there were such regulations, any man might establish a tippling shop, a livery stable or a factory, in juxtaposition with the finest private residences or churches or public buildings, and the city government would be powerless to prevent it.

“The regulation of the location of buildings is, undoubtedly, as essential a branch of municipal control, for the comfort, safety and symmetry of a city, as the character of the material to be used; and we have no more right to cut down the sweeping language of the statute, so as to deprive the Commissioners of supervision of this branch of the subject so necessarily involved in any complete system of building regulations, than we would have to limit it in the other direction, by denying them the power to decide whether the buildings shall be of wood or brick.

“The language of this act is much broader than that of section 79 of the Revised Statutes of the District of Columbia, which gave specifically to the Board of Public Works the power to make all necessary regulations for the construction of buildings;

since the primary sense of the word 'construction' was that of edification or piling up, as of a house. And it is not unimportant to observe that this act of the 14th of June, 1878, chap. 194, was passed three days after the passage of the act of Congress, chap. 180, establishing the present form of government and which specially adopted the laws then in force, among them this section 79, which had been kept alive by the first act establishing the Board of Commissioners. Laws 1874, chap. 337.

"It would thus appear that the act of the 14th of June must have been designed to place the power of regulation of buildings upon a broader foundation than had been expressed in section 79, already in force within the District.

"We heard no authority referred to, and have been unable to find any case, showing that such general grant of power to establish building regulations does not also embrace the power to determine the location of the buildings.

It will be instructive to examine the various acts of Congress and of the municipality respecting this subject, since the origin of the city government, and observe the construction they have received. The conveyance by the original proprietors to the Commissioners, Beall and Gantt, declared that the property should be subject to 'such terms and conditions as shall be thought reasonable by the President, for the time being, for regulating the materials and manner of the buildings and improvements on the lots generally in the said city, or in particular streets or parts thereof, for common convenience, safety and order; provided such terms and conditions be declared before the sale of any of the said lots,' etc. Webb's Digest, 56.

Under these provisions President Washington, be-

fore the sale of any of the lots, on the 17th of October, 1791, established various building regulations for the city of Washington, under no other grant of power than that contained in the trust deed, and several of his successors in office established further regulations on the subject.

The regulations ordained by these successive Presidents not only described the character of the material to be used, but also limited the size, height and area of all wooden houses, and forbade, under a penalty, their erection within certain localities, or within twenty-four feet of a brick or stone house; and yet they had no other support than the power expressed in the trust deed to 'regulate the material and manner of the buildings.'

The Circuit Court decided, in *Miller vs. Elliot*, 5 Cranch C. C., 543, that a provision expressed in these regulations, constituted a condition annexed to every house lot in the city.

In 1822 all these regulations of the several Presidents up to that time were expressly adopted by an ordinance of the corporation, which went on to forbid the erection of a frame blacksmith shop, factory, or livery stable, within fifty feet of a brick or stone house. The power to pass this last regulation was to be found nowhere else in the new charter of 1820, except in the provision which authorized the corporation almost in the words of the trust deed, 'to regulate, with the approbation of the President, the manner of erecting and the materials to be used in the erection of houses.' But the charter was silent as to any express authority to make provision as to the relative location or proximity of wooden houses to other buildings.

In November, 1863 (p. 246, Webb's Digest), the corporation, by ordinance, declared that no license

should be granted for a livery stable unless the assent of a majority of the people owning real estate, white housekeepers, residing on the same side and on the opposite side of the square should first be obtained; and also that it should not be lawful to erect a livery stable within fifteen feet of the building line of any street or avenue, nor within fifty feet of any dwelling house fronting on any street or avenue, under a penalty; and it was made the duty of every proprietor of a licensed livery stable within the city of Washington to have the entire sidewalk in front of his premises paved with brick in a certain way.

There was no authority for this further legislation beyond the previous provisions of the charter authorizing the regulation of 'the manner of erecting and the material to be used,' unless it can be found in the amendment to the charter in 1848 (p. 496), which authorized the corporation 'to license, tax, and regulate livery stables;' but in like manner was silent as to the location of buildings or the necessity of obtaining the assent of the neighbors before the license should be granted.

The charter of 1820 (p. 492), in like manner had given to the corporation the power 'to provide for licensing hotels;' but nothing was there said as to their location or as to the necessity of the assent of the neighbors. Nevertheless the corporation, by an ordinance (Webb, Digest, 222), passed in 1864, declared that no hotel or restaurant should be kept without a license being first had and obtained, and that the person applying for the license should first produce to the mayor a certificate signed by the commissioner of improvements and six respectable freeholders residing in the same square, etc.; and similar

and more stringent provisions were made with respect to restaurants and tippling shops.

In like manner the charter was silent as to the necessity of the assent of the neighbors to the establishment of a retail establishment. But this was made a prerequisite by the ordinance of March, 1861 (Webb, Digest, 93), to the location of a coal, wood, or lumber yard, in these words:

‘It shall not be lawful for any person or persons to establish or locate any coal yard, lumber yard or wood yard upon any new site or any site not used as such for the period of six months, within fifty feet of any dwelling house in the city, unless the person or persons desiring to establish or locate any such coal yard, lumber yard or wood yard, shall first file with the register of the city the written consent of the owner or owners, occupant or occupants, of each and every house within said fifty feet of the ground, etc., contemplated to be occupied.’

We have searched in vain through these charters, from beginning to end, for any authority to justify this requirement as a prerequisite to issuing such licenses, unless it be found in the same general power ‘to regulate the manner of erecting and the materials to be used in the erection of houses,’ given by the charter.

In 1871 the corporations of Washington and Georgetown were abolished. The charters were continued in existence by section 95 of the Revised Statutes only for certain specified purposes; but the laws and ordinances of the cities and of the levy court, except where modified by Congress or inconsistent with those laws, were declared to remain in full force by section 91, R. S. D. C.

By section 2 of this organic law, as we call it, it was declared that this District was created a govern-

ment by the name of the District of Columbia, by which name it was constituted a body corporate for municipal purposes; and then followed the general statement of the several important powers vested in the corporation, viz.: by that name it may 'contract and be contracted with, sue and be sued, plead and be impleaded, have a seal and exercise all other powers of a municipal corporation, not inconsistent with the Constitution and laws of the United States and the provisions of this act.'

By section 79, R. S. D. C., the Board of Public Works was given the authority, already cited, to 'make all necessary regulations respecting the construction of private buildings in the District of Columbia, subject to the supervision of the legislative assembly.'

These being the only grants of power on this subject committed to the new corporation, let us examine how in fact it did construe these powers. In section 9, chapter 69, session 1, of the laws of the legislative assembly of the District, we find this re-enactment, in what might be called an aggravated form of the previous regulations as to coal and wood merchants, including also lumber men and livery stable keepers:

'That the keeper of every livery stable, wood, coal or lumber yard, shall, before engaging in such business, obtain the consent, in writing, of a majority of the persons owning real estate, and a majority of the residents keeping house on the same side of the square on which is the principal front of the stable or yard about to be built or kept, and the side of the square fronting immediately opposite, for him to enter upon and engage in such business, the register to determine which is the principal front; and without such permit being first obtained, it shall be unlawful to grant such license.'

Now, what was the authority for this legislation? The most direct grant of power was that in section 79, authorizing the Board of Public Works to make regulations concerning the construction of private buildings. But this direct grant was accompanied by the further grant of the general authority to exercise all other powers of a municipal corporation, and by the residuum of inherited power from all the antecedent laws and ordinances of the previous corporations not then repealed. In the same direction we find, in section 10 of the same act, provisions similar in substance, with reference to licenses for hotels and drinking-houses, declaring that unless a majority of the residents in the neighborhood signify their consent, in writing, no license shall be given. And yet nobody questioned all this legislation, and it has been acted upon again and again, and acquiesced in by the courts as valid.

What are the powers of the present District Government? By the Act of 1874, chapter 377, entitled, 'An Act for the Government of the District of Columbia, and for Other Purposes,' it was declared, in section 1, that all provisions of law providing for an Executive, Secretary, Legislative Assembly, Board of Public Works and delegate, were repealed; and by section 2, that all the powers then lawfully vested in the Governor or Board of Public Works should be exercised by the Commissioners, except as limited by the Act.

On the 11th day of June, 1878, chapter 180, which is the present organic act, was passed, entitled, 'An Act Providing a Permanent Form of Government for the District of Columbia.' That declares that the District, and the property and persons that may be therein, shall be subject to any existing laws applicable thereto, not thereby repealed or inconsistent with

the provisions of the Act; that the District shall remain and continue a municipal corporation, as provided in section 2 of the Revised Statutes, 'and the Commissioners herein provided for shall be deemed and taken as officers of said corporation; and all laws now in force, relating to the District of Columbia, not inconsistent with the provisions of this act, shall remain in full force and effect.'

Whatever powers, therefore, were exercised by either of the previous governments, over the subject of buildings, by virtue of existing statutes, ordinances or regulations, belong to the present government; and in addition to these powers, there now exists the special and further power given by the Act of June 14, 1878, under which the regulation of the 29th December, 1886, was passed.

We see nothing in this long-continued construction and exercise of power by the previous governments, which should induce us to decide in favor of one citizen to the annoyance of so many of his fellow-citizens, that the regulation in question is in excess of the powers thus accumulated and vested in the present Commissioners.

We consider it safer to rely upon the analogies to be deduced from our own laws than to wander into foreign jurisdictions, and be guided by decisions based upon constitutions, statutes and ordinances to which we are strangers, and delivered in communities whose policy may be very different from ours.

Our own reports furnish several decisions in which the courts of the District have shown their purpose not to be astute to construe away the chartered rights of the municipality in favor of those who seek to evade the law.

Thus in *Corporation of Washington vs. Casanave*, 5 Cranch C. C., 500, it was decided that, under the

charter which declared that retailers might be licensed, a license might be exacted of a coal and wood merchant, although it was argued that he was not necessarily a retailer.

Again, in *Corporation of Washington vs. Eaton*, 4 Cranch C. C., 352, it appeared that Eaton was in the habit of practicing pistol-shooting within his own grounds. There was an ordinance forbidding persons from discharging firearms within the city limits, 'idly and for sport and amusement.' When charged with its violation, he denied the authority of the corporation to pass the ordinance, insisting that the powers of the municipality should be strictly construed. But the court held that the authority might be found in the grant of power to prevent nuisances, as the firing of pistols under one's window might become a nuisance; and that it might be further justified under the power to prevent fires; and they enforced the ordinance.

There are similar decisions to which it is not necessary to refer, evincing that our courts have been disposed to support the rights of the public, within proper limitations, by a reasonable construction of the powers of the city government.

The regulation of December 29, 1886, is perfectly in sympathy with the legislation of the corporation respecting livery stables wood and coal yards, hotel and drinking houses, and kindred enterprises. The power claimed is also in the direction of that which had been given in the charter of 1820 (p. 492, Webb); and also of section 3 of the Act of 1863 (p. 136), which expressly provided that the mayor, whenever in his opinion the public interest required, might refuse to issue a license, for any exhibition for gain. This section is not expressly repealed, although there

is no mayor to execute it; but we refer to the provision as further evidence, as we conceive, in a very strong degree, of the continued purpose and settled policy on that subject in the District for more than half a century.

It is evident that the present regulation of the Commissioners is in the direction of this settled policy, and it is not to be forgotten that we are dealing here with a case where an application is made for an affirmative act to be done by the officers of a great city, who, it can scarcely be supposed, were intended by Congress to be reduced to mere automata, while the officers of every other municipality are endowed with such a measure of discretion in the premises as may enable them to protect their fellow-citizens from such unreasonable demands, which may be made without regard for, and in opposition to the wishes and the good of the great majority.

This case has been the subject of careful examination, and, after full reflection, we are all of the opinion that it was within the competency of the Commissioners to pass such a regulation as that of the 29th December, 1866.

It remains to inquire whether the particular provisions of the regulation are 'reasonable' within the signification properly attached to that expression by the courts. It would not be sufficient, of course, that the members of the court might think that they themselves would not have voted for the measure, or that, in their judgment, it is not altogether wise. Within recognized limits these questions are left for the decision of those who are empowered to make the regulations.

If a corporation should undertake to raise the license for a trader from three to five dollars, it

would not be for a court to pronounce the ordinance an unreasonable one; while if the corporation were to tax a man doing a business of a thousand dollars a year, to the amount of nine hundred dollars, a court might well say that was unreasonable. In old times, in this city, before there were such facilities for extinguishing fires as we have now, every citizen was required, under penalty, to keep fire buckets, made of leather, one for each story of his house. Suppose the corporation had required that each householder should keep five buckets for each story. The court would not have declared that to be an unreasonable regulation, under the duty of protecting the community against fire. But it undoubtedly would have pronounced it unreasonable for a corporation to ordain that a curfew should sound at nine o'clock, and every man should put out the lights and fires in his house; although that would perhaps be the most effectual method possible to prevent fires.

We have been unable to discover anything in the regulation under examination unreasonable in the sense of the principle referred to. On the contrary, we consider it an eminently wise and proper provision.

All people know that, however carefully a theatrical performance may be conducted, it involves late hours, and considerable noise during the day and far into the night, frequently accompanied by the music of bands outside as a means of advertising; and that this must constitute a serious disturbance to the inmates of dwellings, to the young and old, the well and the sick, in the immediate neighborhood. It is for these reasons that theaters almost always are located in parts of the city devoted rather

to business purposes than to dwellings exclusively. It is also well known that such structures are considered a hazardous risk by the insurance companies; and when placed in a thickly built-up square, containing stables with their combustible contents, they may well constitute a source of apprehension.

It appears in this instance that the neighborhood is entirely devoted to dwellings; that the rink is opposite a church where services are held in the week days as well as on Sunday; that combustible stables are numerous in the square; and that if such an establishment were to be located there, it would be in opposition to the sentiment of nearly, if not all, the neighboring citizens.

If no regulation existed of the character of that under examination, and the claim of an applicant must prevail over the remonstrances of every one else immediately interested, it would result that any adjacent proprietor who persisted in his demand must obtain a permit to erect such a theater, or a circus, or billiard saloon, or livery stable, or wood yard, next to any church, or hospital, or court room in the city; and this, although every voice might be opposed to it of the neighboring taxpayers, who may possess property a thousand times more valuable than the amount proposed to be invested.

It would be an extraordinary spectacle if the government of a great city should be powerless to prevent the location of such an establishment as would work a serious impairment, if not the destruction of the comfort of a large mass of its citizens who may have passed their lives in obedience to the law, at the mere demand of a single person who is indifferent to the injury he is thus inflicting upon others, for his personal advantage. For, after the theater had thus

been allowed to be erected, the injured parties would be without any other chance of redress or remedy, except to hazard the difficult attempt, in the courts, to abate what would have become an established institution; incurring all the expense, abuse and obloquy usually accompanying such litigation where any are rash enough to undertake it.

The Supreme Court of the United States, in 108 U. S., 333, *B. and P. R. R. Co. vs. Fifth Baptist Church*, used this language in condemnation of a claim that a grant to a railroad company to construct a depot would authorize its establishment anywhere about the city, 'even in front of the President's house or the Capitol, or in the most densely populated locality,' as Mr. Justice Field said. The court says:

'Whatever the extent of the authority conferred, it was accompanied with this implied qualification: that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights or powers conferred.'

For the reasons given, we are all of the opinion that this application should be overruled in whatever form it is presented, and it is so ordered:

Mr. Justice James concurring:

At the suggestion of my colleague, I add a word of concurrence.

One of the original building regulations, under which the building of the city was begun, provided that no house should be built on any of the avenues of less height than thirty-five feet. From this it ap-

appears that the power given to the President was construed broadly, and was understood to include more than the regulation of materials and methods of construction with reference to mere safety. The plain purpose of this particular provision was to secure a general effect, a city of agreeable appearance. It was conceived then that a building had relations quite beyond the separate interests of its owner and of concern to the whole community.

When a similar power was vested by Congress in the corporation of Washington, to be exercised under the approval and consent of the President, so as to conform to the condition of the original grant of these lands to the government commissioners, there was no intention, I think, to restrict its people to narrower limits. In the absence of any legislative interference in that direction, we have a right to suppose that it was intended that the power should still be construed broadly, and there is still better reason to understand that the powers given to the present government of the District are to be so construed. The act of 1878 provides that this District shall be a corporation as provided by the second section of what is commonly called the organic act, by which a governor and legislative assembly were provided, and that section gave to the corporation, then established, all municipal powers consistent with the Constitution and laws of the United States. Provision was not made by the act of 1878, for the exercise of all these municipal powers by the new board of District Commissioners, but this broad grant to the corporation is to be kept in mind in construing such powers as to have been specifically given to the Commissioners. I conceive, for example, that when power to make building regulations was given to the Commissioners, coupled with a declaration that such regu

lations should have the force and effect of laws, it was intended that this power should be construed in connection with the grant of municipal powers in the act of 1878, and that it must have the extent which municipal power over such a subject may have, consistently with the Constitution and laws of the United States.

It may not be necessary to lay down that rule broadly in this case, but we are fully justified in giving a broad construction to the power granted as one of the municipal powers given to this corporation. When the power is so considered, it seems to me clearly competent in making building regulations, to provide that certain kinds of buildings, shall not be erected in certain neighborhoods, and to have reference, in making this discrimination, to the uses to which they must be put. If a regulation may have reference to the safety of neighbors it is just as competent to determine the question of neighborhood safety by the test of the use to which a building is to be necessarily applied as by the test of material of which it is to be constructed. The Commissioners have a right to withhold a permit on the ground that a theater necessarily adds a new danger which is not to be thrust into a neighborhood without the consent of the neighbors just as they have a right to forbid the erection of wooden houses within certain limits. They have authority to provide that buildings which must bring dangers shall not be erected at all unless certain conditions are satisfied.

It may be added that, by requiring the consent of the neighbors, the Commissioners have not turned over to those persons the exercise of any power in the premises. They have merely provided a means of ascertaining for themselves the propriety of allowing such a building to be erected in the proposed place."

In addition to the instances cited by Judge Hagner, in the foregoing case, of the use of the police power by a municipality to require legal consents, are the following:

Section four of the act of the late legislative assembly of November 9, 1866, governing bill-posting provided:

“It shall not be lawful for any person, or persons to set up or post any bill-boards, bills, placards, or advertisements in any of the avenues, streets, sidewalks, or alleys in the city of Washington, except in such places, and in such manner, and under such restrictions as the mayor may impose, nor without first obtaining the consent of the occupant of the property in front of which said bill-boards, bills, placards, or advertisements may be set up or posted, under a penalty of not less than five nor more than ten dollars for each and every offense, to be prosecuted and collected as other fines and penalties” (Webb’s Digest, p. 46).

This was in turn succeeded by the act of Congress approved July 1, 1902 (license act), section 7, paragraph 39 of which provides:

“That billposters and persons engaged in the business of painting or placing signs or advertisements on land, buildings, billboards, fences or other structures in the District visible from the street or other public space shall pay an annual tax of twenty dollars.
 * * * No person shall place, exhibit, maintain
 * * * any advertisement or poster except upon
 such land, &c. * * * as the Commissioners
 * * * may in their discretion authorize in writing for that purpose. The said written authority shall only be granted in resident streets upon application made in writing and signed by a majority of the residents on the side of the square in which said

display is to be made and also the side of the confronting square, &c., &c."

The license act requires as conditions precedent to conducting certain kinds of business the following:

Paragraph 27. "Place of business for shooting gallery where firearms are to be used" * * * The written consent of a majority of the occupants and residents on the same side of the square or block in which the proposed gallery is to be located and also on the confronting side of the square fronting opposite to the same.

Paragraph 2 gives specially the right to regulate "hotels and theaters" * * * for the protection of life and property.

Merry-go-rounds, mediums and the storage of oils are to be licensed in the discretion of the Commissioners, Chief of Police, and Fire Marshal, respectively, by paragraphs 28, 32, and 40.

Paragraph 48 is a recognition of similar regulations by providing that nothing in the act "shall be interpreted as repealing any of the police or building regulations of the District of Columbia regarding the establishment or conduct of the businesses, trades, professions, or callings therein named.

Persistently Congress has asserted the right to require local consents for saloons (act March 3, 1893), and by the act of April 20, 1908, the Commissioners were especially empowered to regulate private hospitals and asylums under which, by regulation of May 19, 1909, a regulation was promulgated requiring that:

"No person shall establish or maintain any part of any private hospital or asylum, either for human beings or domestic animals, unless or until said person has filed with said Commissioners the written consent of not less than two-thirds of the owners

and the occupants of all buildings located on lots or subdivisional lots, any part of which lots or subdivisional lots is within one hundred feet, measured in a straight line, from the nearest part of said establishment used for the care and treatment of patients."

Other acts of Congress recognizing the local option principle are act of January 12, 1899, governing the establishment of building lines and sections 1608 *et seq.* of the Code, for condemnation of alleys.

Congress by act of January 26, 1887, gave the Commissioners power to pass police regulations within certain limitations, but by joint resolution of February 26, 1892, it gave the following power:

"SEC. 2. That the Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations, in addition to those already made under the act of January 26, 1887, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the District of Columbia."

Under this power and by section two of the "Organic Act," giving all other powers of a municipal corporation (5 Mackey, 397), this local option principle has continuously been maintained.

There are the following instances in the police regulations now in force:

ART. 2, SEC. IX. "No junk shop shall be kept within the fire limits * * * without obtaining the approval of the Commissioners * * * nor before obtaining the written consent of a majority of

the residents and property owners upon the same side of the street in the same square, and of a majority of the residents and property owners upon the opposite side of the street in the confronting square; and if the said junk shop or other shop or store or place be situated in an alley, before obtaining the written consent of a majority of the residents and property owners of the whole of said block or square in which the said alley may be situated."

Article 9a, section 16, prohibits the storing of powder and dynamite within 250 feet "from a tenanted house or highway."

Article 7, section 6, provides that "no roosters are to be kept on the premises without the consent of a majority of the householders in that square or block."

Sections 13 and 14 of article 13 provide:

"No license shall issue or be transferred or assigned, for any apparatus, or machines, known as merry-go-rounds, flying horses, ferris-wheels, or similar devices, nor shall such apparatus, machine or devices, be located or operated on any lot, open space, or other place within the District of Columbia, without the written consent be first furnished the assessor and approved by the Commissioners, of two-thirds of the actual resident housekeepers within two squares in any direction surrounding said lot, space, or place wherever said apparatus, machines, or similar devices are proposed to be located or operated."

"SEC. 14. No circus shall be located, operated, or conducted on any lot or open space without the written consent of seventy-five per centum of the residents keeping house in the square on which it is proposed to locate the circus, and in each of the squares confronting such square."

Article 13, section 15, passed October 19, 1906, governed public garages. On November 7, 1906, it was transferred to the building regulations where it became section 143a. Section 15, as amended March 12, 1909, is now as follows.

“No license shall be issued for the establishment of any cheap place of public amusement, such as five-cent theaters, moving picture shows, and the like unless the written consent be first furnished the assessor of the District of Columbia and approved by the Commissioners of said District of a majority of the actual resident housekeepers and of a majority of the merchants, storekeepers or shopkeepers occupying stores or shops on the same side of the square where it is desired to locate such public amusement, and on the confronting side of the square opposite the same; Provided, That the entrances of the residence of said housekeepers, or the entrances to the stores, shops, or places of business of said storekeepers, shopkeepers or merchants be on the same street or avenue as the entrance of said public amusement.”

Section 1 of article 19 provides:

“No person shall establish or maintain a cow yard, pen or stable within any of the more densely populated parts of the District of Columbia, within two hundred feet of any building used as a dwelling house, manufactory, store or place of public assemblage, without the written consent of the owner of such building; such consent to be renewed upon the first day of July of each year upon thirty days' notice to the health officer to that effect.”

The other regulations applicable were published as “building regulations” under the act of Congress of June 14, 1878, passed three days after the act establishing the present form

of government, which last mentioned act continued in force section 79 of the Revised Statutes of the United States. The "building regulations" are "promulgated" formally under authority of the act of June 14, 1878, but actually the authority lies in said section 79, R. S. U. S., section 2 of the "organic law"—act of 1871—and the act of 1878.

"By section 2 of the organic law, as we call it, it was declared that this District was created a government by the name of the District of Columbia, by which name it was constituted a body corporate for municipal purposes; and then followed the general statement of the several important powers vested in the corporation, viz: by that name it may 'contract and be contracted with, sue and be sued, plead and be impleaded, have a seal and *exercise all other powers of a municipal corporation*, not inconsistent with the Constitution and laws of the United States and the provisions of this act."

"By section 79, R. S. D. C., the Board of Public Works was given the authority, already cited, to make all necessary regulations respecting the construction of private buildings in the District of Columbia, subject to the supervision of the legislative assembly" (*Strausburger vs. Commissioners*, 5 Mackey, pp. 397, 398).

The act of June 14, 1878 (20 Stats., 131; Abert's Comp. Statutes, 207), among other things provides:

"The Commissioners of the District of Columbia be, and they hereby are, authorized and directed to make and enforce such * * * building regulations for the District as they may deem advisable."

"Such rules and regulations made as above provided shall have the same force and effect within the District of Columbia as if enacted by Congress."

Attention is invited to the following building regulations:

"SEC. 166. * * * No party-fence shall be less than five nor more than seven feet in height, except by consent of the parties interested on both sides of such fence." * * *

"SEC. 168. No coal, wood, or lumber yard, nor yard * * * shall be established upon new site or site not used for such purposes for the period of one year previously, within fifty feet of any building or property not used for business purposes of a similar character or business requiring the written consent of owners of surrounding property on either side of the site in question, unless the person or persons desiring to establish or locate any such premises shall file with the inspector of buildings the written consent of all the owners of real estate within ninety feet of said site," &c., &c.

Sec. 170, as to location of markets requires the written consent of the owners of more than one-half of the property situated in the square on which said market is to be located, and the owners of more than one-half of the front feet of the property on the sides of squares confronting the square containing the site for the market.

Sec. 171, as to the location of brick yards, slaughter houses, soap or candle factories, bone-boiling establishments, &c., this section requires that no such building shall be located within 250 yards of a dwelling without the written assent of the owners of all property within 250 yards of the site occupied or to be occupied by such building or premises.

